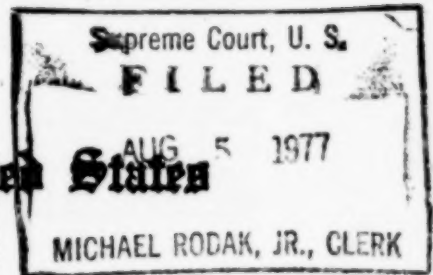


No. 77-2001

**In the
Supreme Court of the United States**

OCTOBER TERM 1976



DAVID P. KAYE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT**

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To: The Honorable, The Chief Justice and Associate
Justices of the Supreme Court of the United States.

Petitioner, David Kaye, prays that a writ of certiorari
issue to review the judgment of the United States Court
of Appeals for the Seventh Circuit.

Opinion Below

The opinion of the Court of Appeals is not yet officially
reported, but is printed in the Appendix to this Petition
(App. A, pp. 2-21).

Jurisdiction

The decision of the Court of Appeals was filed on May 16, 1977. Petitioner's timely Petition for Rehearing and suggestions for rehearing *en banc* were denied on July 8, 1977, a copy of which order is printed in the Appendix to this Petition (App. B, p. 22). This Petition is filed within 30 days of July 8, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented For Review

1. Whether the term "indictable" offense, when used by the Congress, has any significance, or can it be interpreted to mean any "offense" (misdemeanor or petty offense) because, under Rule 7(a) of the Federal Rules of Criminal Procedure, the prosecutor may, in his discretion, proceed by indictment on any misdemeanor or petty offense, though the Constitutional imperative under the Fifth Amendment extends only to infamous and serious crimes?

2. Whether the exercise of the option to the prosecutor to proceed by indictment or information in the case of misdemeanors under Rule 7(a) deprived this defendant of due process of law under the Fifth Amendment and of the Fourteenth Amendment guarantee of equal protection of the law, which is implicit in the Fifth Amendment guarantee of due process?

3. Whether the "drastic increase" of penalties for multiple misdemeanors under Title 18, U.S.C. §1962 requires a re-examination of the established *mens rea* of mere "reckless conduct" to support convictions under §186(b)? (Compare *U.S. v. Nu-Phonics*, E.D. Mich., 46 LW 2001)

4. Whether this case which by indictment descends to a particularization of the generic term "representation of employees" to "part-time business agent" can tolerate conviction on the basis of defendant's being a "chief steward" and be consistent with the Sixth Amendment and with this Court's rulings in *Russell v. United States*, 369 U.S. 749, 765, *United States v. Cruikshank*, 92 U.S. 542, 558 and *United States v. Simmons*, 96 U.S. 360, 362.

Constitutional and Statutory Provisions Involved

The Constitution of the United States:

AMENDMENT V—

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI—

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT VIII—

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Title 18 United States Code:

§ 1961.

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) *any act which is*

indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States; (Emphasis supplied)

§ 1962.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than \$25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

Rule 7.

(a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indict-

ment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

Title 29 United States Code:

§ 186.

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(a) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b) (1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

Statement of The Case

David Kaye was convicted in a bench trial on a seventy-four count indictment of violation of 28 U.S.C. § 186(b) (1) and 18 U.S.C. § 1962(c). He was sentenced to the custody of the Attorney General for two years on Count 1 which charged a violation of 18 U.S.C. § 1962(c). Petitioner was also sentenced to three years probation consecutive to the two year prison sentence for violation of 29 U.S.C. § 186(b)(1) on Counts 2 through 74. The complained of acts occurred between October 28, 1969, to on or about June 21, 1974.

The eighty-one page indictment has been analyzed under the third of our proposed reasons for granting the writ for which we here pray.

Statement of Facts

The Court of Appeals found the pertinent facts substantially as follows (App. 5-7).

Petitioner was a member of Local 714 of the Machinery, Scrap Iron Metal and Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees, International Brotherhood of Teamsters (hereinafter referred to as Local 714). Local 714 was the exclusive bargaining agent for temporary employees performing material handling and other work at trade shows, expositions, conventions and similar functions in the Chicago metropolitan area.

Petitioner acted in several capacities for Local 714. First, he served as part-time business agent for Local 714 since 1971. Petitioner received one hundred dollars a week for this work.

Petitioner also acted as chief steward for the trade shows. Service contractors contacted petitioner in his capacity as chief steward to arrange for labor to perform tasks in relation to the trade shows and expositions. The position of chief steward did not receive compensation from either Local 714 or the service contractor. The position of chief steward was in no way connected to Petitioner's role as part-time business agent.

As chief steward, Petitioner selected union stewards for the trade shows. Petitioner alone appointed the union stewards. If the work was to be conducted on one floor, one union steward would be appointed. If the work was conducted on separate floors or in different geographical locations, a union steward would be appointed for each

work area. The position of union steward was separate from chief steward. The union steward was an employee of the service contractor who was paid at an hourly rate which was higher than the rest of the work crew. The duties of the union steward included the following: protection of the jurisdiction of Local 714, handling payroll matters, checking crews in in the morning and checking crews out in the evening, investigating grievances, checking job safety, ensuring that work is done smoothly, and generally caring for the welfare of the men in the crew. Testimony by service contractors indicated that the union steward was expected to be physically at the job site. Absence from the job site was permitted with the approval of the employer as where the union steward was handling union business.

It was proper for petitioner as chief steward to appoint himself to act as union steward for a particular job. Petitioner's exercise of the right to appoint himself union steward led to the charges in this case.

Reasons for Granting The Writ

This Court should issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit on the following grounds;

1. In enacting the definition statute controlling RICO offenses (18 U.S.C. § 1961 et seq.), the Congress described multiple offenses as constituting "Racketeering Offenses," when two or more offenses constituted "any act which is indictable" under twenty-some sections of the federal criminal proscriptions. Only one such offense is a misdemeanor, Title 29 U.S.C. § 186. The decision of the Court below excepts "indictable offenses" from their accepted and historical meaning and it violates the policy of lenity.

Title 29 U.S.C. § 186(b) defines a misdemeanor. The pertinent part of Title 18 U.S.C. § 1962, under which Count I is brought looks to § 1961(1) for its definitions, and defining statutes are conclusive. That section defines "racketeering activity" as an "act which is indictable" under various sections, including Section 186. There is no proscribed activity defined in § 186 that is "indictable" as that term is used, and interpreted, under the Fifth Amendment, Clause 1.

Black's Law Dictionary, Revised Fourth Edition, defines the word "indictable" as follows:

"Proper or necessary to be prosecuted by process of indictment. Indictable offenses embrace common law offenses or statutory offenses, the punishment for which are infamous."

An infamous crime is a felony and not a misdemeanor.

In Words and Phrases, Volume IV, the heading "Indictable Offense" is found the following:

"Under constitution. Article I, Sections 18 to 25 providing that no person can for an indictable offense be

proceeded against criminally by information, except in certain specific instances, misdemeanors were not intended to be braced in the words 'indictable offense'. That phrase included felonies only. State v. Berlin, 42 Missouri 574; State v. Cowan, 29 Missouri 330."

While the prosecutor contended that, at his option, a misdemeanor *could* be initiated by indictment, the Trial Court below recognized the irreconcilability:

"The wording of Section 1961(c) is patently inconsistent. The Court concludes that either Congress made a simple drafting error when it used the word 'indictable' or, alternatively, Congress did not intend to punish any act proscribed by Section 186. According to the notes following Section 1961, it was the intent of Congress that the provisions of the Organized Crime Control Act of 1970 be liberally construed to effectuate its remedial purpose. That being so, it is clear to the Court that, of inclusion of Section 1961(c), Congress intended that those activities proscribed by Section 186 to be punishable under Section 1962 irrespective of their designation as misdemeanors or felonies." (Doc. 15, pp. 2-3)

We submit that, while the Trial Court's recognition of patent inconsistency is admirable, generalities of intents of liberal construction do not reconcile with the basic rule of strict construction; nor with the prohibition against striking inconsistent provisions in order to enforce one or the other. The policy of lenity would require that § 186 be stricken from the statute (Title 18 U.S.C. § 1961) as the inconsistency, since it is the only non-indictable offense listed. It would also demand the recognition that the Congress, in common sense, did not intend to raise a single misdemeanor offense to felony proportions of the highest order when two or more of those misdemeanors is charged. The legacy of a free people would demand that when a legislature defines such a felony, it take pains and studious application to speak in unmistakable terms.

We submit that the more logical reading is that the legislature made an error of inclusion. We do not believe it can be attributed to the Congress that it intended to make misdemeanors touching on Union affairs more grievous than those touching on business, individual or even government affairs.

The government contended below that *surely* the more reasonable view of the term "indictable offense" is any offense the prosecution of which may be commenced by indictment. The fallacy of that contention is that any offense, even a petty offense, may be commenced by indictment. See Rule 7(a) of the Federal Rule of Criminal Procedure providing that "[a]ny other [except felonies] may be prosecuted by indictment or by information." And the Court of Appeals followed suit.¹

This reasoning has two major flaws in the scheme of federal criminal and statutory law. First, it amends the statute to strike the word "indictable" from it, contrary to this court's many decisions that Courts may not construe away legislative requirements. *Montana v. Kennedy*, 366 U.S. 308, 314. Equally "it is for Congress, not this Court, to rewrite the statute." *Blount v. Rizzi*, 400 U.S. 410, 419.

Secondly, it gives to the executive prosecutor (through his election to proceed by information or indictment in misdemeanor offenses) to regulate whether Title 18 U.S.C. § 1962(c) has been violated, insofar as that statute predicates its vitality on multiple misdemeanor offenses. In other words, to our knowledge, this is the only criminal

¹ "This court does not find the language in § 1961(1)(c) to be inconsistent since a misdemeanor as defined in 18 U.S.C. § 1(2) can properly be prosecuted either by way of indictment or information. See Fed.R.Crim.Pro. 7(a). Thus, an act committed in violation of § 186(b)(1) is 'indictable' as that word is used in § 1961(1)(c)." (App. 8)

federal statute, which has as a predicate the acts of the prosecutor, as opposed to the accused. We know of no precedent for this. But on general tenets of statutory construction, this law must, in these circumstances, fail. It is *the* general rule that penal statutes are construed narrowly to insure that no individual is convicted unless "a fair warning [has first been] given to the world in language the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27. But we understand that maxim to mean that the perpetrator has passed that line, and the line is of general application, not one constructed at the option of the prosecutor.

We also submit the decision in this case is in plain conflict with this Court's decision in *United States v. Campos-Serrano*, 404 U.S. 239.²

² "The Court of Appeals held that the limited, merely permissible, re-entry function of the alien registration receipt card is sufficient to make it a "document *required* for entry into the United States" under § 1546. 430 F.2d, at 175. We cannot agree. It has long been settled that "penal statutes are to be construed strictly," *Federal Communications Comm'n v. American Broadcasting Co.*, 347 U.S. 284, 296, 74 S.Ct. 593, 601, 98 L.Ed. 699, and that one "is not to be subjected to a penalty unless the words of the statute plainly impose it," *Keppel v. Tiffin Savings Bank*, 197 U.S. 356, 362, 25 S.Ct. 443, 445, 49 L.Ed. 790. "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222, 73 S.Ct. 227, 229, 97 L.Ed. 260. In § 1546, Congress did speak in "clear and definite" language. But, taken literally and given its plain and ordinary meaning, that language does not impose a criminal penalty for possession of a counterfeited alien registration receipt card. Alien registration receipt cards *may* be used for *re-entry* by certain persons into the United States. They are not *required* for entry." (404 U.S. at p. 297-8)

We submit certiorari should be granted to resolve the application of this unusual—but far-reaching statute, of admitted ambiguity operating now to this petitioner's prejudice.

2. Assuming *arguendo* this Court accepts the determination of the Court of Appeals that a misdemeanor is an "indictable offense" if the prosecutor elects to indict, the concept that the necessary criminal intent of mere "reckless disregard" under the misdemeanor statute (Title 29 U.S.C. § 186(b)) cannot, in consonance with this Court's decisions in *Dennis v. United States*, 341 U.S. 494 and cases cited therein, continue to be the standard when Title 18 U.S.C. § 1962(c) converts multiple violations of the § 186(b) proscription into a felony authorizing twenty-years of imprisonment. This also raises an Eighth Amendment question adverted to in the dissent in *Lambert v. California*, 356 U.S. 225, 231 and this Court's main decision in *Coker v. Georgia*, 97 S.Ct. 2861, 2865.

Though the Court below was alerted to the effect of Title 18 U.S.C. § 1962(c)'s generating a multiple of misdemeanor offenses into a felony of the highest order (20 year sanction provided), the Court nonetheless found a "reckless disregard" standard acceptable to sustain conviction. On such a minimal standard, your petitioner now stands convicted a felon, and faces a two-year sentence on *the* § 1962(c) count. Restricting itself to the pattern of established cases in the 7th Circuit (*United States v. Inciso*, 292 F.2d 374 and *United States v. Keegan*, 331 F.2d 257, *cert. den.* 379 U.S. 828), the Court below concluded that "the Government proved that defendant acted with a reckless disregard for § 186" (App. 16-17). It disdained the question

of the conversion of multiple misdemeanors into a felony, and whether more was required.³

The key sentence in the opinion of the Seventh Circuit is found on Page 14. It states as follows:

"For the following reasons, we believe that the government proved that the defendant acted with reckless disregard for Section 186."

The Court defined reckless conduct in the context of a § 186 violation in *United States v. Keegan* where the Court held whether or not the defendant was reckless is subjective and difficult to prove. Reckless conduct, in this context consists of two elements: Knowledge of the material facts surrounding the prescribed conduct and knowledge that this conduct is likely to be illegal. This "reckless conduct"

³ The government contended below that § 186 is a "grievous misdemeanor" because it carries a possible \$10,000 fine. We pointed out that many misdemeanors carry potentially large fines. See e.g. Title 15 U.S.C. §1, \$50,000; §2, \$50,000; Title 21 U.S.C. §842(a), \$25,000; Title 26 U.S.C. §7203, \$10,000; Title 45 U.S.C. §359(a) or (b), \$10,000; Section 402(c)(2) of the Drug Control Act, \$25,000; Section 1011 of same act, \$25,000; Section 11(b)(4) of the Water Quality Improvement Act, \$10,000. More importantly, in this context, *United States v. Ryan*, 2 Cir., 232 F.2d 481, on remand from 350 U.S. 299 was articulate:

"As we have just construed it, it does indeed forbid gifts of all kinds by employers to 'representatives', save as excepted, and there can be no doubt, if it be so understood, it is altogether clear. True, it then covers gifts, however trifling and innocuous, but we can see no reason on that account to narrow its scope. *The penalties prescribed make it apparent that they could not have been meant as sanctions for heinous offenses; and Congress may well have wished to put a stop to the practice, even on occasions inconsiderable and harmless in themselves, rather than to make verbal distinctions that would be troublesome in application.*" (232 F.2d at 483) (Our emphasis)

therefore, is sufficient to convict the defendant Kaye of a felony calling for imprisonment of 20 years and/or \$25,000. The basic charge under 186(b), Title 29 is of course a misdemeanor. Stated in a very simple form the decision in this case permits a defendant to accept wages for more than one employer for two consecutive work weeks thus forming a "pattern of unlawful conduct" thus subjecting him not only to the 20 year felony charge, but also dire civil consequences including loss of his position. A civil action has been filed against David Kaye by the United States in an effort to strip him of his opportunity to remain employed because of this conviction.

It should be noted that in the variety of cases noted in footnote 3, and including this, none is a proscription dictated by Title 18, except insofar as Title 18 U.S.C. § 1962(c) raises the multiple charges under Title 29 U.S.C. § 186 to such a status. Those statutes, including § 186, are regulatory. But the ascendancy of § 186, through the implementation of Title 18 U.S.C. § 1962(c) raises this incidence of multiple offenses against the regulatory statute into a different class, and contrary to this Court's direction, no heed was given the shift in class.

"A survey of Title 18 of the U.S. Code indicates that the vast majority of the crimes designated by that Title require, by express language, proof of the existence of a certain mental state, in words such as "knowingly," "maliciously," "wilfully," "with the purpose of," "with intent to," or combinations or permutations of these and synonymous terms. The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence. See *American Communications Ass'n v. Douds*, 1950, 339 U.S. 382, 411, 70 S.Ct. 674, 690, 94 L.Ed. 925."

Dennis v. United States, 341 U.S. 494, 500.

The drastic increase in criminal penalties for Anti-Trust violations under the Sherman Act has caused the Courts to recognize that a standard of proof theretofore securely settled must be re-evaluated in order to bring the *mens rea* into an atmosphere commensurate with the increased penalties. *U.S. v. Nu Phonics*, E. Mich. 46 L.W. 2001. The need for re-evaluation here is more pressing, since the crimes here evaluated are not tinged, as are Sherman Act violations, with a general public interest. Significantly in the Sherman Act violations the allowable penalty has been increased, of course, to a felony but that allowable penalty is only tripled, whereas, in this instance for as little as a double violation the penalty has been increased 20 fold. Further significantly, in the Sherman Act the allowable fine or collateral consequence has been only doubled for a person, whereas, in this case the allowable penalty contemplates not only fine but divestiture of the means of making a livelihood. See 18 U.S.C. § 1964.⁴

Mr. Justice Frankfurter speaking for 3 of 4 dissenting in *Lambert v. California*, and supporting the view tending to uphold conviction, nonetheless recognized that the question involved here would raise several serious Constitutional issues:

"Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment, and, in respect to the States, even offend the Due Process Clause of the Fourteenth Amendment."

Lambert v. California, 355 U.S. 225, 231.

⁴ A separate civil action for the purpose of forever barring this petitioner from being employed in union-related industry except as a rank-and-file laborer because of this conviction pends.

See also this Court's recent decision in *Coker v. Georgia*, 97 S.Ct. 2861, 2865.

This significant question—involving the great number of United States citizens involved in the organized labor force—should, we submit, compel this Court to issue its writ.

3. Even though this Court has recognized that Title 29 U.S.C. § 186(b) defined the class to be affected in generic terms (See *United States v. Ryan*, 350 U.S. 299, 302), and the indictment did accordingly descend to specifics in the 73 charges under § 186(b) [and by incorporation into the Title 18 U.S.C. § 1962(c) charge], conviction nonetheless rests here on *any* activity within the generic description as opposed to the specific in direct conflict with this Court's rulings in *Russell v. United States*, 369 U.S. 749, 765 and *Stirone v. United States*, 361 U.S. 212.

We think the basis for urging this Court grant certiorari on this element is most concisely demonstrated by the record itself. The defendant was charged in 74 counts, counts 2 through 74 reading precisely the same except for time and amounts of money (all minor). They read that he

“being a representative of employees employed in an industry affecting commerce and an employee of a labor organization, as that term is used in Title 29, United States Code, Section 186(a)(2), *that is, a part-time Business Agent* of Local 714, International Brotherhood of Teamsters, did unlawfully, willfully and knowingly accept and receive money. . . .” (Our emphasis).

The allegations of these counts are included severally or inclusively in paragraphs 11, 12, 14, 15 through 17 of Count One (the Title 18 U.S.C. § 1962(c) count).

So far as this issue herein concerned, it is more lucid to simply state what the Court of Appeals said:

“8. . . . Defendant appears to argue that the indictment alleges only representative status based upon his position as part-time business agent of Local 714. Defendant asserts that “part-time Business Agent” limits “representatives of employees”.

“We find this argument to be without merit. The indictment did not define defendant's status as a representative of employees in terms of his position as part-time business agent.

* * *

“The Government contends that defendant was shown to be both a representative of employees and an employee of Local 714. The Government asserts that defendant was shown to be a representative of employees due to the nature of his role as union steward. The Government also argues that defendant's part-time position as business agent was adequate proof of his status as an employee of Local 714.

“For the following reasons, we agree with the Government.

“First, evidence at trial demonstrated that defendant was a representative of employees due to his activity as union steward. The union steward represented the union in any jurisdictional problem occurring on the job, investigated grievances, ensured that job conditions were safe, checked in the men in the morning and checked the men out at night, ensured that union dues were paid up by checking union cards, and generally looked out for the welfare of the men. The record also indicated that service contractors expected that the union steward would be physically present at the job site unless excused to perform union duties. We believe that these activities qualified defendant as a representative of employees. See *United States v. Ryan*, 350 U.S. 299 (1956); *Brennan v. United States*,

240 F.2d 253 (8th Cir. 1957), cert. denied, 353 U.S. 931; *Mechanical Cont. Ass'n. of Philadelphia v. Local Union 420*, 265 F.2d 607 (3rd Cir. 1959); *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), cert. denied, 361 U.S. 929. We also note that defendant on August 17, 1976, was given an opportunity to raise questions concerning proposed findings of fact by the district judge. Defendant in the district court did not question the validity of the following finding of fact adopted by the lower court:

"4. That David Kaye acted as a representative of those employees of Service Contractors named in the indictment who were members of Teamster Local 714 in matters of wages, hours and conditions of employment;

"We also find that defendant's position as part-time business agent for Local 714 with a weekly salary of \$100.00 supports a finding that defendant was an employee of a labor organization within the meaning of § 186(a)(2). "Section 186 has the clear purpose of declaring unlawful all payments or valuable gifts or loans made by an employer to an officer, employee, or representative of a labor organization which represents employees working for that employer." *United States v. Fisher*, 387 F.2d 165, 169 (2nd Cir. 1967), cert. denied, 390 U.S. 953.

• • •

"Congress in 1959 foreclosed this argument when it passed Section 186 to cover "any officer or employee" of a labor organization. *Fisher*, 387 F.2d at 168.

"Thus although defendant's position as part-time business agent did not relate to representation of employees and did not carry the power to sell out the union or enter into sweetheart contracts, defendant was nonetheless an employee covered by § 186. We again note that defendant did not challenge below the

district court's finding of fact that defendant was an employee of Local 714.

"We find to be without merit defendant's contention that *Fisher* requires a showing both that defendant was acting as a business agent when engaged in illegal conduct and that defendant was performing officer duties and functions. The court in *Fisher* only stated that even a person not formally an officer could fall within the broad definition of officer." (App. 12-16)

Thus, it is the decision of the Seventh Circuit that though your petitioner was charged with violations of § 186(b)(1) in his "part-time business agent" capacity, he did not, in fact, accept money in that capacity. He was convicted, on the contrary, of accepting money in his capacity as union steward on several jobs to which he appointed himself in his other capacity as chief steward.⁵

The Court in *United States v. Ryan*, 350 U.S. 299, made it eminently clear that Congress intended the word "representative" in § 186(a) to be a comprehensive as opposed to a restrictive term. In other words, "representative" is a generic term, as was clearly recognized in the Seventh Circuit's own holding in *United States v. Donovan*, 339 F.2d 404, 407-8.

We respectfully submit that the elementary principle of criminal pleading is that where the definition of an offense employs generic terms, it must descend to particulars, as

⁵ The Government argued that the exemption under Title 29, U.S.C. §186(c)(1) was not applicable to this Petitioner on just this basis:

"First, the Government argues that defendant was not paid for services rendered as an employee [part-time business agent] since he was paid for services as a union steward" (App. 18)

this one did. But the particular must be proved, not anything that is within the ambit of the generic term. Otherwise, the conviction violates the Sixth Amendment. It violates this Court's ruling in *Russell v. United States*, 369 U.S. 749, 765.

We find it impossible to distinguish the Sixth Amendment violation here from that noticed by this Court in *Stirone v. United States*, 361 U.S. 212, 215-219.

We also find it impossible on a common-sense reading of the indictment to rationalize that "part-time business agent" modified only that part of the indictment describing petitioner as an employee of the union local, but does not modify the term "representative". But, if that reasoning has validity, then the generic term "representative" has been used without specification, as proscribed by this Court's landmark decisions in *United States v. Cruikshank*, 92 U.S. 542, 558 and *United States v. Simmons*, 96 U.S. 360, 362.

CONCLUSION

Wherefore, for the above and foregoing reasons, it is respectfully prayed that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

EDWARD J. CALIHAN, JR.

ANNA R. LAVIN

Attorneys for the Petitioner -

David P. Kaye

APPENDIX

APPENDIX A

IN THE

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 76-1814

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID KAYE,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.

No. 74 CR 882—Alfred Y. Kirkland, *Judge.*

ARGUED FEBRUARY 8, 1977—DECIDED MAY 16, 1977

Before BAUER and WOOD, *Circuit Judges*, and SHARP*,
District Judge.

WOOD, *Circuit Judge.* Defendant-appellant David Kaye
(hereinafter referred to as defendant) was convicted

* The Honorable Allen Sharp, United States District Court for
the Northern District of Indiana, is sitting by designation.

in a bench trial on a seventy-four count indictment of violation of 28 U.S.C. § 186(b)(1)¹ and 18 U.S.C.

¹ 29 U.S.C. § 186 provides in part:

(a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—

(1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a

(footnote continued)

§ 1962(c).² Defendant was sentenced to the custody of the Attorney General for two years on Count 1 which charged a violation of 18 U.S.C. § 1962(c). Defendant was also sentenced to three years probation consecutive to the two year prison sentence for violation of 29 U.S.C. § 186(b)(1) on Counts 2 through 74. The complained of acts occurred between October 28, 1969, to on or about June 21, 1974.

(footnote continued)

labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; . . .

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

² 18 U.S.C. § 1962(c) provides:

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. § 1961 serves as the definitional section for § 1962(c). The relevant portions of § 1961 are as follows:

As used in this chapter—

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), Sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate

(footnote continued)

Defendant raises for our consideration the following questions on appeal: 1) whether 29 U.S.C. § 186(b)(1) is an "indictable offense" so as to qualify as racketeering activity within the meaning of 18 U.S.C. § 1961; 2) wheth-

(footnote continued)

credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

* * *

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

* * *

er the Government proved that defendant was involved in a "pattern of racketeering activity" as that term is defined in 18 U.S.C. § 1961(5); 3) whether defendant acted "in the conduct of" the union's affairs when he committed the acts for which he was convicted; 4) whether defendant was a representative of employees or an employee of Local 714; 5) whether defendant acted with the requisite intent; and 6) whether defendant's conduct falls within an exception pursuant to § 186(c)(1).

For the following reasons, we affirm the lower court's decision.

Briefly, the facts are as follows.

Defendant was a member of Local 715 of the Machinery, Scrap Iron Metal and Steel Chauffeurs, Warehousemen, Handlers, Helpers, Alloy Fabricators, Theatrical, Exposition, Convention and Trade Show Employees, International Brotherhood of Teamsters (hereinafter referred to as Local 714). Local 714 was the exclusive bargaining agent for temporary employees performing material handling and other work at trade shows, expositions, conventions and similar functions in the Chicago metropolitan area.

Defendant acted in several capacities for Local 714. First, defendant served as part-time business agent for Local 714 since 1971. Defendant received one hundred dollars a week for this work.

Defendant also acted as chief steward for the trade shows. Service contractors³ contacted defendant in his

³ Service contractors provided labor to exhibitors in Chicago trade shows and expositions. Each service contractor operated under a collective bargaining contract with Local 714 which required the service contractor to obtain temporary employees from Local 714.

capacity as chief steward to arrange for labor to perform tasks in relation to the trade shows and expositions. The position of chief steward did not receive compensation from either Local 714 or the service contractor. The position of chief steward was in no way connected to defendant's role as part-time business agent.

As chief steward, defendant selected union stewards for the trade shows. Defendant alone appointed the union stewards. If the work was to be conducted on one floor, one union steward would be appointed. If the work was conducted on separate floors or in different geographical locations, a union steward would be appointed for each work area. The position of union steward was separate from chief steward. The union steward was an employee of the service contractor who was paid at an hourly rate which was higher than the rest of the work crew.⁴ The duties of the union steward included the following: protection of the jurisdiction of Local 714, handling payroll matters, checking crews in in the morning and checking crews out in the evening, investigating grievances, checking job safety, ensuring that work is done smoothly, and generally caring for the welfare of the men in the crew. Testimony by service contractors indicated that the union steward was expected to be physically at the job site. Absence from the job site was permitted with the approval of the employer as where the union steward was handling union business.

It was proper for defendant as chief steward to appoint himself to act as union steward for a particular job. Defendant's exercise of the right to appoint himself union

⁴ The evidence indicates that the hourly wage received by the union steward was from \$.50 to \$1.00 higher per hour than that received by the rest of the crew.

steward led to the charges in this case. Generally stated, defendant was charged with accepting money from the service contractors for services as a union steward when defendant did not in fact provide such service. More specifically, defendant was charged in Counts 4 through 11 with placing himself on the payroll of service contractors as a union steward for trade shows held in Chicago when defendant was in fact absent from Chicago. In addition, defendant was also charged with being carried on more than one payroll as union steward for the same hours on the same day when the jobs were in different geographic locations or on more than one floor in a building.

1) Section 186(b)(1) as an "indictable" offense.

Defendant argues that 29 U.S.C. § 186(b)(1) cannot be the basis for a violation of 18 U.S.C. § 1962(c) since violation of § 186(b)(1) is a misdemeanor. Section 1962(c) proscribes one form of racketeering activity. Section 1961(1)(c) defines racketeering activity as:

any act which is indictable under Title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) . . .

Defendant argues that misdemeanors were not intended to be within the scope of the meaning of "indictable". Thus, defendant contends that the legislature erroneously included § 186 as a form of racketeering activity and that § 186 should be stricken from the statute.

The district court agreed with defendant that the language in § 1961(1)(c) is inconsistent but rejected defendant's contention that § 186 should be stricken from § 1961(1)(c). The lower court held:

The wording of Section 1961(c) is patently inconsistent. The Court concludes that either Congress

made a simple drafting error when it used the word "indictable" or, alternatively, Congress did not intend to punish any act proscribed by Section 186. According to the notes following Section 1961, it was the intent of Congress that the provisions of the Organized Crime Control Act of 1970 be liberally construed to effectuate its remedial purpose. That being so, it is clear to the Court that, by inclusion of Section 1961(c), Congress intended those activities proscribed by Section 186 to be punishable under Section 1962 irrespective of their designation as misdemeanors or felonies.

This court does not find the language in § 1961(1)(c) to be consistent since a misdemeanor as defined in 18 U.S.C. § 1(2)⁵ can properly be prosecuted either by way of indictment or information. See Fed.R.Crim.Pro. 7(a).⁶ Thus,

⁵ 18 U.S.C. § 1 provides:

Notwithstanding any Act of Congress to the contrary:

- (1) Any offense punishable by death or imprisonment for a term exceeding one year is a felony.
- (2) Any other offense is a misdemeanor.
- (3) Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than \$500, or both, is a petty offense.

⁶ Federal Rule of Criminal Procedure 7(a) provides:

- (a) Use of Indictment or Information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.

an act committed in violation of § 186(b)(1) is "indictable" as that word is used in § 1961(1)(c). There is no basis either in the legislative history of § 1961(1)(c) and § 186(b)(1) or in the statutory procedure authorizing use of an indictment for misdemeanor to support defendant's assertion that Congress erroneously included § 186 as a form of racketeering activity.⁷

2) "Pattern of racketeering activity".

Defendant was charged with engaging in a "pattern of racketeering activity" in violation of 18 U.S.C. § 1962(c). Section 1961(5) defines pattern of racketeering activity:

- (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

Defendant relies on the definition of the term "pattern" found in *United States v. White*, 386 F.Supp. 882 (E.D. Wis. 1974), to support his argument that the Government failed to prove a "pattern of racketeering activity." The

⁷ Defendant relied on *United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221-2 (1952), for the proposition that when a choice has to be made between two readings of a criminal statute, the broader alternative should not be chosen unless clear legislative intent supports such a choice. We need not employ that canon of construction in the present case since the statutory language which is here under examination is susceptible to "a commonsensical meaning." 344 U.S. at 221.

This court also notes that Congress expressly stated that the provisions of 18 U.S.C. 1961 et seq. should be liberally construed to effectuate its remedial purpose. *United States Code Congressional and Administrative News*, 91st Cong., 2nd Sess., P.L. 452 section 904, p. 4036.

Government agrees with defendant that *United States v. White, supra*, accurately sets forth the necessary relationship for proof of a "pattern of racketeering activity." The Government further asserts that defendant was shown to have engaged in acts which constitute a pattern of racketeering activity.

Judge Gordon in *United States v. White*, 386 F.Supp. at 883-4, examined the meaning of the term "pattern":

I conclude that the defendant's position is without merit. In common usage, the term "pattern" is applied to a combination of qualities or acts forming a consistent or characteristic arrangement. Use of the term "pattern" in connection with two racketeering acts committed by the same person suggests that the two must have a greater interrelationship than simply commission by a common perpetrator. The acts alleged in count I are part of a particular continuing criminal activity.

In my judgment, there is implicit in the statutory definition of "pattern of racketeering activity" a requirement that the government must prove such an interrelatedness beyond a reasonable doubt in order to obtain a conviction under § 1962(c). No claim is made that only organized crime figures commit the various crimes which are designated at § 1961 as "racketeering activity." Absent a showing of a "pattern" or interrelatedness of such activity, § 1962(c) could be used against the isolated acts of an independent criminal; such was not the intended target of the challenged statute.

See also *United States v. Campanale*, 518 F.2d 352, 363 n. 32 (9th Cir. 1975), cert. denied, 423 U.S. 1050.

We find that defendant was shown to have engaged in continuous and related criminal activity over the four and one-half year period covered by his indictment.

3) Conduct of Union Officers.

Defendant asserts that if his actions were illegal, he was acting in the conduct of his own affairs and not in the conduct of Local 714's affairs. Defendant points to argument by counsel for the Government which indicated that both the service contractors and Local 714 were injured by defendant's conduct. Defendant contends that he should have been charged as an "enterprise" in his individual capacity.

Paragraph 11 of Count one which charged violation of § 1962(c) stated in part:

. . . defendant herein, being an employee of and associated with Local 714, an enterprise engaged in and the activities of which affect interstate commerce, unlawfully and knowingly conduct and participate, directly and indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

The language in Count one tracks the statutory language of § 1962(c), which makes it unlawful for any person to conduct or participate in the conduct of an enterprise's affairs through a "pattern of racketeering activity". "Enterprise" is defined in § 1961(5).

The evidence demonstrated that defendant was conducting or participating in the affairs of Local 714 when he committed the acts for which he was charged. Defendant as chief steward conducted Local 714's affairs in appointing himself as union steward, and accepting payments as union steward from union contractors for services which were not rendered. Thus, defendant's argument is without merit.

4) Representative of employees or an employee of Local 714.

Violation of § 186(b)(1) can be proven in the present case if payments were made to any representative of employees, § 186(a)(1), or to any labor organization, officer, or employee of a labor organization, § 186(a)(2). Defendant alleges that the Government failed to prove that defendant was a representative of employees of Local 714. First, defendant contends that proof that he was part-time business agent does not show representative status since his function as part-time business agent was in no way connected to his activity as chief steward or union steward. In addition, defendant also argues that his role as union steward did not constitute a representative status since the collective bargaining agreement provided that the union steward represented employees only if union representatives are not available.⁸

The Government contends that defendant was shown to be both a representative of employees and an employee of Local 714. The Government asserts that defendant was

⁸ Counts 2 through 74 of this indictment allege in substantially the same language as follows:

"being a representative of employees employed in an industry affecting commerce and an employee of a labor organization, as that term is used in Title 29, United States Code, Section 186(a)(2), that is, a part-time Business Agent of Local 714, International Brotherhood of Teamsters, did. . . .

Defendant appears to argue that the indictment alleges only representative status based upon his position as part-time business agent of Local 714. Defendant asserts that "part-time Business Agent" limits "representatives of employees".

We find this argument to be without merit. The indictment did not define defendant's status as a representative of employees in terms of his position as part-time business agent.

shown to be a representative of employees due to the nature of his role as union steward. The Government also argues that defendant's part-time position as business agent was adequate proof of his status as an employee of Local 714.

For the following reasons, we agree with the Government.

First, evidence at trial demonstrated that defendant was a representative of employees due to his activity as union steward. The union steward represented the union in any jurisdictional problem occurring on the job, investigated grievances, ensured that job conditions were safe, check in the men in the morning and checked the men out at night, ensured that union dues were paid up by checking union cards, and generally looked out for the welfare of the men. The record also indicated that service contractors expected that the union steward would be physically present at the job site unless excused to perform union duties. We believe that these activities qualified defendant as a representative of employees.⁹ See *United States v. Ryan*, 350 U.S. 299 (1956); *Brennan v. United States*, 240 F.2d 253 (8th Cir. 1957), cert. denied, 353 U.S. 931; *Mechanical Cont. Ass'n. of Philadelphia v. Local Union 420*, 265 F.2d 607 (3rd Cir. 1959); *Korholz v. United States*, 269 F.2d 897 (10th Cir. 1959), cert. denied,

⁹ Although the collective bargaining contract between the service contractors and Local 714 is not part of the record on appeal, it appears that section 5 of the collective bargaining contract provided that the union steward was to be elected by the employees and would represent employees when union representatives were not available. The record indicates, however, that defendant as chief steward chose union stewards. Nonetheless, the collective bargaining contract reflects that the union steward acted as a representative of employees.

361 U.S. 929. We also note that defendant on August 17, 1976, was given an opportunity to raise questions concerning proposed findings of fact by the district judge. Defendant in the district court did not question the validity of the following finding of fact adopted by the lower court:

4. That David Kaye acted as a representative of those employees of Service Contractors named in the indictment who were members of Teamster Local 714 in matters of wages, hours and conditions of employment;

We also find that defendant's position as part-time business agent for Local 714 with a weekly salary of \$100.00 supports a finding that defendant was an employee of a labor organization within the meaning of § 186(a)(2). "Section 186 has the clear purpose of declaring unlawful all payments or valuable gifts or loans made by an employer to an officer, employee, or representative of a labor organization which represents employees working for that employer." *United States v. Fisher*, 387 F.2d 165, 169 (2nd Cir. 1967), cert. denied, 390 U.S. 953.

In *Fisher*, *supra*, the defendant who was an officer of the union contended that he was not an officer within the meaning of § 186(b) since he had no power to sell out the union or enter into sweetheart contracts. The defendant in *Fisher* asserted also that he did not hear or present employee grievances or negotiate on behalf of employees with the employer. The court in rejecting this argument stated:

Congress in 1959 foreclosed this argument when it passed Section 186 to cover "any officer or employee" of a labor organization. *Fisher*, 387 F.2d at 168.

Thus, although defendant's position as part-time business agent did not relate to representation of employees and did not carry the power to sell out the union or enter into sweetheart contracts, defendant was nonetheless an employee covered by § 186.¹⁰ We again note that defendant did not challenge below the district court's finding of fact that defendant was an employee of Local 714.

We find to be without merit defendant's contention that *Fisher* requires a showing both that defendant was acting as a business agent when engaged in illegal conduct and

¹⁰ Legislative history also supports the proposition that the receipt of payments by any employee of a union without more constitutes a violation of § 186:

Section 111: Amends section 302(a), (b), and (c) of the Labor Management Relations Act, 1947, as amended, primarily for the purpose of clarifying an ambiguity which presently exists. Under present law it is illegal for an employer to pay or deliver anything of value to a representative of his employees. The amendments contained in this section would remove any doubt that all forms of bribery and extortion which might escape the provisions of existing law would be prohibited under pain of criminal penalties for conviction thereof. *The intent of these amendments to section 302(a) and (b) is to forbid any payment or bribe by an employer of anyone who acts in the interest of an employer whether technically an agent or not and to forbid the receipt of any such bribe by any person, whether an individual, an officer or employee of a labor organization or a committee representing employees.* Payment to and receipt of such payments by any union officer or employee having the intent of influencing such officer or employee in respect to any of his actions, decisions, or duties as a representative of employees or as such union officer or employee would also be made a criminal offense. (Emphasis Added)

United States Code Congressional and Administrative News, 86th Cong., 1st Sess., P.L. 86-257, p. 2360.

that defendant was performing officer duties and functions. The court in *Fisher* only stated that even a person not formally an officer could fall within the broad definition of officer.

5) Willfulness.

The defendant claims that the Government failed to prove that he acted willfully as is required by § 186(d). This court in *United States v. Incisio*, 292 F.2d 374, 380 (7th Cir. 1961), stated:

We hold that the term "willfully violates" in Section 186(d) contemplates proof of an awareness of the restrictions of that section or a reckless disregard for that section.

Defendant asserts that the Government did not prove either awareness of the restrictions of § 186 or a reckless disregard for that section.

For the following reasons, we believe that the Government proved that defendant acted with a reckless disregard for § 186.

This court further defined reckless conduct in the context of a § 186 violation in *United States v. Keegan*, 331 F.2d 257, 262 (7th Cir. 1964), cert. denied, 379 U.S. 828. The court there stated:

Whether or not defendant was reckless is subjective and difficult of proof. Reckless conduct, in this context, consists of two elements: knowledge of the material facts surrounding the proscribed conduct and knowledge that this conduct is likely to be illegal. See Hall, *General Principles of Criminal Law* 120 (2d ed. 1960).

The first element, knowledge of the facts, is to be determined by the subjective method, i.e., whether defendant has *actual* knowledge. The second element, while requiring subjective knowledge, may be proved by the objective method, i.e., whether a reasonable man would be aware that such conduct would likely be illegal. Hall, *op. cit. supra* 120, 155, 165.

The court in *Keegan* in approving an instruction which gave only the first element of reckless conduct stated:

Instructing the jury as to the first element of "reckless" and withholding from it the second element was done in *United States v. Alaimo* (D.C.M.D. Pa.), 191 F.Supp. 625 (1961) aff'd 3 Cir., 297 F.2d 604, cert. denied, 369 U.S. 817, 82 S.Ct. 829, 7 L.Ed.2d 784, as follows:

"A person who is a representative of employees employed in an industry affecting commerce may be held to have willfully violated § 186(b) upon a showing that he received or accepted money from the employer of such employee (or from the agent of such employer) with knowledge (1) that he was receiving or accepting money, and (2) that the person who was giving him the money was an employer of employees (or the agent of such employer) that he represented." Id. 181 F.Supp. at 627.

We hold that the jury was properly instructed on the term "willfully violates."

331 F.2d at 262.

In the present case, we have no doubt that defendant received money with knowledge that the funds were coming from employers (service contractors) of employees

whom he represented. In addition, the second element was also satisfied since a reasonable man would be aware of possible illegality in serving on multiple payrolls for the same time period where the jobs were on different floors or in different geographical locations or accepting payment for work while out of town.

6) Exception under § 186(c)(1).

Defendant offers two theories to support his assertion that he falls within the exception of § 186(c)(1). First, defendant argues that he acted openly for the service contractors in "matters of labor relations or personnel administration." Defendant also contends that the money received by him was compensation for employee services.

The Government, on the other hand, contends that § 186(c)(1) is not applicable to this case. First, the Government argues that defendant was not paid for services rendered as an employee since he was paid for services as a union steward by multiple employers in separate locations for the same time periods. Since all of the employers stated that the union steward's physical presence was expected unless permission was given to be absent, the Government asserts that defendant could not have earned money received from the service contractors. The Government relies on *United States v. Motzell*, 199 F.Supp. 192 (N.J. 1961), to support its position. In *Motzell*, the court considered the propriety of simultaneously working for multiple employers and concluded that such activity would not fall within § 186(c)(1):¹¹

It is true that there are instances where a man can with all propriety be engaged in two separate employ-

¹¹ The court in *Motzell*, however, found defendant to be innocent because he had not acted willfully.

ments at the one and the same time. The practice is, unfortunately, increasing due to our economy, where to make ends meet men have more than one employment. But these secondary employments are so-called after hour or week-end jobs, not performed at the one and the same time that the employee is performing work for the other employer.

It is, likewise, true that in this particular instance Cherbonnier was working for more than one company or client. But there is a great difference. Cherbonnier was being paid by his clients while Motzell, representing the employee members of the Union, was being paid by the Company employer.

If this practice (i.e., working for two employers) would be approved as not contravening the statute, where, along the line would it stop? Some would argue that one could indulge in such activities for two companies, some would say five, some would say ten. It is this Court's opinion that such a practice could and would constitute a form of extortion by a union upon a company or companies that the Act is designed to forbid. The Court, therefore, concludes that the actions of the defendant, Motzell, as pertains to the second count, were proscribed by the Act and we, therefore, come to the question of whether such actions were wilful.

Secondly, the Government also asserts that the defendant did not act openly for service contractors in matters of labor relations or personnel administration. The Government claims that the evidence showed that union stewards acted on behalf of the union and employees and not on behalf of the service contractors.

This court agrees with the Government that § 186(c)(1) cannot properly be invoked in this case. First, as we have already indicated, the union steward acted on behalf of Local 714 and employees of the service contractors. The union steward protected union jurisdiction, investigated grievances, ensured that job conditions were safe, checked union cards to ensure that dues were paid up, and generally looked out for the welfare of the men. Thus, although the employer may have benefited from the performance of these functions by the union steward, the union steward did not act on behalf of the employer in matters of labor relations or personnel administration. In addition, we do not believe that the evidence showed that defendant received compensation by reason of his services as an employee. On the contrary, the Government properly pointed out that physical presence was repeatedly referred to as a requisite to performance of the role as union steward. We do not find that defendant who was out of town or was acting as union steward for multiple jobs in separate locations received "compensation for, or by reason of, his service as an employee."¹²

¹² Our conclusion that compensation received by defendant was not legitimate wages is supported in part by the following legislative history to § 186 which condemns union employees and representatives who act to further self-interest or personal profit:

For centuries the law has forbidden any person in a position of trust to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom they serve. Such a person may not deal with himself, or acquire adverse interests, or make any personal profit as a result of his position. The same principle has long been applied to trustees, to agents, and to bank directors. It is equally applicable to union officers and employees. The ethical practices code of

(footnote continued)

CONCLUSION

For the foregoing reasons, the judgment of the district court is hereby affirmed.

A true copy:

Teste:

*Clerk of the United States Court of
Appeals for the Seventh Circuit*

(footnote continued)

the American Federation of Labor and Congress of Industrial Organizations states—

It is too plain for extended discussion that a basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as a workers' representative.

After the McClellan committee hearings no one can dispute the simple fact that although the vast majority of union officials are honest and conscientious men, a small number have ignored this basic standard of conduct. No one would deny that the conduct is wrong. The wrongs should not be ignored by the Federal Government. The national labor policy is founded upon collective bargaining through strong and vigorous unions. Playing both sides of the street, using union office for personal financial advantage, undercover deals, and other conflicts of interest corrupt, and thereby undermine and weaken the labor movement. The Congress should check the abuses in order to foster the national labor policy. The Government which vests in labor unions the power to act as exclusive bargaining representative must make sure that the power is used for the benefit of workers and not for personal profit.

United States Code Congressional and Administrative News, 86th Cong., 1st Sess., P.L. 86-257, pp. 2330-31.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

July 8, 1977.

Before

HON. WILLIAM J. BAUER, *Circuit Judge*

HON. HARLINGTON WOOD, JR., *Circuit Judge*

HON. ALLEN SHARP*, *District Judge*

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

No. 76-1814

vs.

DAVID KAYE,

Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois,
Eastern Division.

No. 74 CR 882

ALFRED Y. KIRKLAND, *Judge*

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

* Honorable Allen Sharp, Judge, United States District Court for the Northern District of Indiana, is sitting by designation.